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No. 09-

IN THE

Supreme Court of the United States

EDWARD R. VRDOLYAK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The defendant acted as a broker on a commercial real estate deal in which he agreed to share his finder's fee with an insider who steered the deal to a developer of their choosing. He pled guilty to mail fraud. The District Judge determined that the "loss" in the case was zero, because the victim ended up receiving fair market value for the sale. Alternatively, the District Judge determined the "loss" was the difference between the highest offer and the actual sale price. Either way, the District Judge believed that probation was sufficient but not greater than necessary as a sentence. The Court of Appeals rejected both loss figures and held that the loss should have been the amount of the finder's fee. The case raises several questions:

1. In reviewing sentences, in cases where the appellate court finds that the district court committed "significant procedural error," which is the first step in the appellate review process, must the appellate court determine whether the error is harmless (whether the district judge would have imposed the same sentence) before remanding, or is remand automatic, and can an error *not* be harmless when the appellate court believes the district court would have imposed the same sentence even if he was aware of the error?

2. Did the appellate court improperly blur the distinction between procedural and substantive error when it appeared to rely on factors having nothing to do with procedure in order to reach the conclusion that the district court committed "significant procedural error," such as the district court's conclusions about intent and the weight it gave to other mitigating factors?

3. Did the government waive issues regarding the alternative loss finding and any arguments regarding the reasonableness of the sentence when the government did not address either of those issues on appeal?

4. Have the circuits been inconsistent in the scrutiny given to financial crime appeals and appeals where the district court sentenced the defendant above the advisory guidelines range as opposed to non-financial crimes cases and cases where the district court sentenced the defendant below the advisory guideline range, such that, when the analysis is cursory, sentences imposed above the advisory guidelines are often affirmed and sentences below the advisory guidelines are often reversed, creating an uneven standard of review?

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OPINION BELOW

The Seventh Circuit Court of Appeals decision is reported at 593 F.3d 676, and is reprinted in Appendix A to this petition at 1a to 34a. The District Court did not publish its decisions relevant to the petition. Two unpublished orders are reprinted in Appendix B at 35a to 41a, and in Appendix C at 42a to 45a. Oral rulings made by the District Court are reprinted in Appendix E at 48a to 58a.

JURISDICTION

The Seventh Circuit filed its opinion on January 29, 2010. Petitioner filed a petition for rehearing pursuant to Federal Rule of Appellate Procedure Rule 40 with a suggestion for rehearing *en banc* pursuant to Rule 35 on February 12, 2010. The majority of the judges on the original panel voted to deny the petition, with one dissent, on March 18, 2010. None of the judges in active service requested a vote on the petition for rehearing *en banc*. *See* Appendix D, 46a-48a. The court denied a motion to stay the mandate on March 26, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

STATEMENT OF FACTS

Chicago Medical School ("CMS") wanted to sell a property it owned that consisted of a lot and a building. Stuart Levine, the CMS board member charged with finding a buyer, sought to steer the sale to a developer who might secretly be willing to pay him a kickback. Levine asked defendant to find him a purchaser who could deal with zoning issues and would be willing to

pay market price, but who also would be willing to pay Levine a fee. Defendant eventually found a developer, Smithfield Properties ("Smithfield"), who was interested in making the purchase, so defendant put them in contact with Levine. Defendant didn't discuss whether Smithfield would pay Levine, he just assumed that in the end he would share with Levine whatever finder's fee Smithfield paid him.

CMS began negotiating a sale with Smithfield, which made offers of $8 million (plus a share of the profits) and then $9.5 million, straight cash. Around the same time, a second developer, Farley Group ("Farley"), learned about the potential sale and made an unsolicited offer of $10 million. CMS did not respond to the offer, apparently due to indifference by Levine. Farley then made a second unsolicited offer, this time for $15 million less a 4% brokerage fee (hence, $14.4 million), which it submitted directly to the CMS Board, bypassing Levine. A board member contacted the CMS President and recommended that CMS accept the Farley offer.

Around the same time, Levine contacted a third potential purchaser, Loyola University, which had expressed an interest in purchasing the Scholl Building in the past. Levine suggested Loyola would have to bid more than $15 million, so Loyola offered $15.5 million, subject to certain contingencies as well as approval by the Loyola Board.

Levine then informed defendant that CMS had received substantially higher offers than the one submitted by Smithfield. Believing that Smithfield had offered "top dollar," defendant angrily told Smithfield

that it would lose the deal unless it met the other offers. Smithfield raised its offer to $15 million.

Levine arranged for an "emergency meeting" of the CMS Board to discuss the sale of the property. Prior to the meeting, the three prospective purchasers were asked to submit their best and highest offers. Smithfield offered the $15 million, Farley offered the $15 million less a 4% commission, and Loyola offered the $15.5 million subject to approval by its Board.

At the Board meeting the three offers were dryly described. Levine suggested Smithfield. The Board chose Smithfield.[1]

Subsequently, defendant reached a compensation agreement with Smithfield. Smithfield would pay defendant a finder's fee of 10% of the purchase price ($1.5 million). Smithfield would pay defendant the first half of the fee when it completed the development, but only after it first repaid the project expenses and the construction loan financing and returned investor equity. It would not pay the second half of the fee unless and until there was a distribution of $5 million in project profits. Defendant agreed to give one-half his finder's fee ($750,000) to CMS' board member, Levine.

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[1] A week later Farley offered $16 million offer less a 4% commission (*i.e.*, $15,360,000), but CMS responded that it had awarded the sale to Smithfield and that the prospective purchasers had been told at the time to submit their best and final offers. Nonetheless, six months later Farley's broker actually made a reduced offer of $15 million less a 5% commission (*i.e.*, $14.25 million).

The government charged defendant with mail fraud, in that he aided and abetted Levine's breach of the duty he owed to CMS. Defendant pleaded guilty, and the sentencing proceedings focused primarily on how to calculate the amount of "loss" caused by defendant's conduct.[2]

The government argued that the loss in the case was too difficult to quantify, the bidding process having been corrupted by the fraudulent scheme. Thus, the government argued that the judge should use the amount of defendant's finder's fee, $1.5 million, as a proxy for the loss. The judge rejected the government's argument. Instead, the judge determined the loss to be zero because CMS ended up receiving the best value in the sale despite the corruption. Alternatively, the judge calculated the loss as $500,000, the difference between the $15 million CMS received from Smithfield and the highest offer CMS turned down, which was $15.5 million from Loyola.

The different loss figures begat different advisory guideline ranges. At $1.5 million, the advisory guideline level came to 20, for an advisory guideline range of 33-41 months. At $500,000, the advisory guideline level came to 18, for an advisory guideline range of 27-33 months. At zero, the advisory guideline level rested at six, for an advisory guideline range of 0 to 6 months.

The judge sentenced defendant to probation, a sentence that fell within the advisory guideline range if

[2] Levine was never prosecuted for this offense. A serial offender, Levine had pled guilty to other frauds and cooperated against the defendant in this one.

the advisory guideline level were six. After analyzing the § 3553(a) factors, however, the judge stated that even if the loss was $500,000, he still would sentence the defendant to probation. The judge rejected any suggestion that the loss was $1.5 million, refusing to credit post-award statements by Farley or Loyola that they would have bid higher given the opportunity.

The government appealed, asking the court of appeals to remand the case for a new sentencing hearing that began with a correct assignment of loss. The government did not address the judge' alternative finding, that if the loss was $500,000 he would have imposed the same sentence, and the government did not address the question of whether the sentence was substantively reasonable.

Still, the Seventh Circuit reversed, with one dissent. The majority held that the judge erred when he refused to consider the post-award statements that Farley or Loyola may have paid even more than the $15.5 million offered by Loyola had the process not been corrupted. The majority found that the judge placed too much emphasis on a plethora of character letters written on defendant's behalf, dismissing them as support that could be obtained by any politician (even though defendant had last held public office — as an alderman — twenty years ago), finding the abundant stories about his charitable good deeds irrelevant, and ruling that the judge erred when he used $15.5 million as a reasonable estimate of fair market value and therefore a reasonable basis from which to estimate the loss. The majority found the correct figure of loss to be the value of the finder's fee — $1.5 million. The panel majority stated that it was

not concerned with the leniency of the sentence as such, but with the procedural errors the judge committed along the way. App. A, 5a. The panel majority nevertheless described the sentence as a "slap on the wrist" and remanded the case to a different judge. During the oral argument the opinion's author expressed his belief that it would basically be fruitless to return the case to the same district judge because that judge would likely impose the same probationary sentence.

Judge Hamilton dissented. Judge Hamilton agreed with the majority that the appropriate loss figure was probably $1.5 million. Judge Hamilton observed, however, that the judge had also used an alternative figure of $500,000, and that the difference in the guidelines between $1.5 million and $500,000 was only two points. He observed further that a departure of 14 levels below level 18 (the $500,000 loss) resulted in the same guideline range (0-6 months) as 14 levels below level 20 ($1.5 million loss). Unlike the majority, who viewed the likelihood that the judge would impose the same sentence as a reason to remove the judge from the case, the dissent viewed the error as harmless. The amount of loss was not what drove the sentence, and the judge clearly would have imposed the same sentence even if he were mindful of the error.

REASONS FOR GRANTING THE PETITION

The instant case raises several questions regarding appellate review of sentences since this Court decided *United States v. Booker*, 541 U.S. 230 (2005) and *Gall v. United States*, 128 S.Ct. 586 (2007), particularly as that review pertains to procedural error. Although the Court has stated clearly that the first step in appellate review is to determine whether the district judge committed procedural error (such as incorrectly calculating the guidelines), confusion abounds in the Circuits as to whether or to what extent harmless error applies when procedural error occurs.

In the instant case the Seventh Circuit, over a lengthy dissent, found that the district judge committed serious procedural error when he calculated the guidelines, and that the error was not harmless. But the court stated at argument its concern that the district judge would have imposed the same sentence even if he had not committed the error — the very definition of harmless error. *See Williams v. United States*, 503 U.S. 202 (1992). By functionally finding harmless error, the Seventh Circuit should have moved to a reasonableness review at that point, but instead it reversed, remanding the case to a new judge.

The place for harmless error in the review of sentences when it comes to significant procedural error has been bedeviling the courts, resulting in inconsistent decisions both within and between the Circuits. That confusion is exacerbated by a lack of definition with respect to exactly what is "procedural" error, with courts, including the Seventh Circuit here, blurring the

distinction between substantive and procedural review. This is a matter requiring Supreme Court attention.

Certiorari should also be granted to address the subject of waiver and forfeiture. The appellate court addressed the district judge's alternative loss figure even though the government did not address it in its brief. Similarly, to the extent the Seventh Circuit's opinion could be read to address the substantive reasonableness of the sentence, that issue was also waived because the government did not address substantive reasonableness in the appeal.

In addition, the Seventh Circuit, along with several other appellate courts, have been applying a more searching review in financial crimes cases than other cases, and in doing so have rejected the sort of mitigating character evidence that traditionally has been considered by courts when imposing sentence, such as positive character evidence and charitable work. This matter is equally ripe for review by the Court so that all the circuits are consistent when it comes to the matters considered for sentencing.

I. THIS COURT SHOULD REVIEW THIS CASE BECAUSE IT RAISES QUESTIONS ABOUT THE STANDARD OF REVIEW THAT APPLIES WHEN A JUDGE SENTENCES A DEFENDANT BASED IN PART ON AN INCORRECT APPLICATION OF THE SENTENCING GUIDELINES

A. *Certiorari* Should Be Granted Because The Seventh Circuit Opinion Conflicts With This Court's Opinion in *Williams v. United States*

Due to its unique circumstances, the district judge found no loss in this case. Alternatively, he found the loss came to $500,000. The court of appeals rejected both figures. It found that the loss was $1.5 million, the amount of the defendant's finder's fee. The alternative loss figure used by the district judge, as opposed to the "correct" loss figure used by the court of appeals, translated into respective advisory guideline levels of 18 and 20 and respective advisory guideline ranges of 27-33 months and 33-41 months. The court of appeals reversed, labeling the error "not harmless," even though it was clear to the court of appeals that the two point difference in advisory guideline levels was not going to lead the judge to impose a different sentence.[3]

[3] The opinion's ultimate author began the oral argument by expressing his view, to the government attorney, that the government would want another judge at sentencing, because the district judge who sentenced defendant originally was just going to impose the same sentence on remand and that the government was not going to get him to change his mind. In the opinion the court stated that it felt the judge was "committed . . . irrevocably to a noncustodial sentence for the defendant." App. A, at 14a.

Error that does not affect the selection of the sentence imposed is the very definition of harmless error. *Williams v. United States*, 503 U.S. 193, 202 (1992). Despite the Seventh Circuit's acknowledgement that the district judge would have imposed the same sentence regardless of the error, the panel majority in one sentence described the error as not harmless. Essentially, the panel majority determined that the error was not harmless because, mindful of the errors, *they* might have imposed a different sentence. Defendant submits that the standard should be whether the *sentencing judge* might have imposed a different sentence. Both the majority and the dissent agreed that the district judge would have imposed the same probationary sentence despite the errors. Thus, the court of appeals should have ruled the errors were harmless.

If this Court were to adopt the Seventh Circuit approach, the Court would have to overrule *Williams*. How to handle harmless error since the guidelines became advisory is an issue ripe for review by this Court, the *Williams* case having been decided nearly twenty years ago.

Here, everyone agreed the judge would have imposed the same sentence. If so, the error was harmless. Under the impression that the correct Guideline range was no more than 27-33 months, the district judge gave defendant a non-custodial sentence. The appellate court determined the advisory guideline range to be slightly higher — 33-41 months. But based on the prior proceedings the court of appeals concluded that the judge would just impose the same sentence.

The court of appeals considered this obstinacy, a reason to send the case to a different judge on remand, rather than call it what it was: harmless error.

That is how the Fifth Circuit called it in identical circumstances. In *United States v. Delgado-Martinez*, 564 F.3d 750, 753 (5th Cir. 2009), the court stated that in proving harmless error, the proponent of the sentence "must point to evidence in the record that the district court had a sentence in mind and would have imposed it notwithstanding the error made in arriving at the defendant's guideline range." The Seventh Circuit here is diametrically at odds with the Fifth Circuit. Having found that the district judge had a sentence in mind notwithstanding the error, the Seventh Circuit would remand the matter to a more flexible judge.

Implicitly, the panel majority applied a standard that asked whether the error would have been harmless *to them*. That overrules *Williams*. Defendant believes that *Williams* should remain the law and the standard should be whether an error is harmless in the eyes of the judge who imposed the sentence in the first place. It is anomalous to conclude, as the appellate court did, the judge would have imposed the same sentence, but that the error is not harmless.

B. *Certiorari* Should Be Granted Because the Circuits Have Been Hopelessly Inconsistent With Whether Harmless Error Applies to Significant Procedural Error

This Court held in *Gall* that the first step in reviewing a defendant's sentence is to determine whether the district judge committed procedural error. Once the court determines there was no significant procedural error, the next step is to determine whether the sentence was substantively reasonable. Although the step by step review is simple to follow, what has been more difficult for the courts below is whether harmless error applies to the first part of this inquiry.[4]

Whether so-called "significant procedural error" is subject to harmless error review remains uncertain. Some courts have held that when significant procedural error occurs, reversal is automatic. *See, e.g., United States v. Kemp*, 530 F.3d 719, 722 (8th Cir. 2008) ("In light of these procedural errors, we do not decide whether the ultimate sentence was substantively reasonable."); *United States v. Shy*, 538 F.3d 933, 937 (8th Cir. 2008); *United States v. Langford*, 516 F.3d 205 (3d Cir. 2008) (failure to start with correct guideline thwarts reasonableness review); *United States v.*

[4] The Seventh Circuit opinion does not clearly delineate whether it is addressing the first part of the inquiry or the second. But the government did not argue that the sentence was substantively reasonable as a fallback in case the appellate court were to rule that procedural error did not exist, and the court in its opinion stresses that its concern in the case was with the procedural errors, not the leniency of the sentence. *See* App. A, 5a, 14a, 16a.

Riccardi, 405 F.3d 852, 872 (10th Cir. 2005) ("We assume for purposes of this case that if a district court makes a mistake of law in consulting and applying the Guidelines, this mistake would warrant a remand."); *In re Sealed Case*, 527 F.3d 188 (D.C. Cir. 2008); *United States v. Kristl*, 437 F.3d 1050, 1055 (10th Cir. 2006) (in situation where district judge incorrectly calculates the guidelines we must remand without reaching issue of reasonableness).

Some courts, on the other hand, take the position that significant procedural error does *not* eliminate harmless error review. *See, e.g., United States v. Lynn*, 592 F.3d 572 (4th Cir. 2010) (claims of procedural error subject to harmless error review); *United States v. Jass*, 569 F.3d 47 (2d Cir. 2009); *United States v. Anderson*, 526 F.3d 319, 330 n. 6 (6th Cir. 2008); *United States v. Henson*, 550 F.3d 739, 741 (8th Cir. 2008); *United States v. Grissom*, 525 F.3d 691, 696 (9th Cir. 2008); *United States v. Arneto-Anaya*, 262 Fed.Appx. 936, 937 (11th Cir. 2008). These latter cases find essentially that nothing in *Gall* undermines the harmless error analysis applied in *Williams*, *see Henson*, 550 F.3d at 740, that standard being whether the district judge — not the appellate court — would have sentenced the defendant any differently.

Thus, the Eighth Circuit in one case said that "significant procedural error" may be harmless, *United States v. Hanson*, 550 F.3d 739 (8th Cir. 2008); the Sixth Circuit in one case said that "significant procedural error" is "rarely, if ever" harmless, *United States v. Anderson*, 526 F.3d 319, 330 (6th Cir. 2008); and the Fifth Circuit, albeit in a non-precedential unpublished opinion,

implied that "significant" procedural error *is* error that is *not* harmless. *United States v. Meuir*, 344 Fed.Appx 3, *4-*5 (5th Cir. 2009) ("If a procedural error is significant – *i.e.*, not harmless — . . ."). *But see United States v. Delgado-Martinez*, 564 F.3d 750, 753 (5th Cir. 2009) (if significant procedural error exists court must remand unless the error did not affect the district court's selection of the sentence imposed).

At the outset of oral argument the opinion's author stated flatly that sending the case back to the same district judge would be fruitless. In the opinion, the court expressed its belief that the judge was committed to imposing a non-custodial sentence. As stated above, this is the definition of harmless error. Thus, in substance the Seventh Circuit has taken the view in the instant case that where procedural error exists, remand is automatic.[5]

Conflicting decisions on the application of harmless error review to procedural error exist intra-circuit as well as inter-circuit. Even in the Seventh Circuit, decisions can be found holding that remand would be pointless where procedural error exists when it is clear the district judge would have imposed the same sentence. *See, e.g., United States v. Abbas*, 560 F.3d 660 (7th Cir. 2009). *See also United States v. Spikes*, 543 F.3d 1021 (8th Cir. 2008). The Tenth Circuit provides an

[5] The court of appeals here mentioned harmless error almost in passing, stating that the "cascade of errors and omissions that we have identified cannot be dismissed as harmless, and so requires that the defendant be resentenced." App. A at 14a. But once again: Harmless to whom? Under *Williams* it should be the district judge, not the appellate court.

example of the schizophrenic approach courts of appeal have taken to this issue. While it has held, much like the Seventh Circuit has functionally done here, that a procedural mistake *requires* a remand, *see, e.g.*, *Riccardi*, 405 F.3d at 872, at other times it has not. In *United States v. Springer*, 315 Fed.Appx 703 (10th Cir. 2009), the Tenth Circuit clarified its holding in *United States v. Pena-Hermosilla*, 522 F.3d 1108 (10th Cir. 2008) (procedural error *not* subject to harmless error review), to stand actually for the principle that significant procedural error *can* be harmless. The court explained that it was "the perfunctory explanation for the alternative holding" in *Pena-Hermosilla* that constituted procedural error and drove the decision. *Springer*, 315 Fed.Appx at 709 (italics omitted).

The *Springer* opinion represents virtually a mirror image of the instant case, but with a conflicting result. The district judge in *Springer* had to choose between advisory guideline ranges of 97 to 121 months or 188 to 235 months. He sentenced the defendant to 240 months. In doing so the judge said she would have sentenced the defendant the same under either guideline range, and the court of appeals affirmed. The judge provided explanations for her sentence at the hearing, and in a written memorandum explained why she felt 240 months was an appropriate sentence, regardless of whether the advisory guideline range was 188 to 235 months or 97 to 121 months. *Springer*, 315 Fed.Appx at 709. That is exactly what the judge did here, only here the difference in guideline ranges overlapped and the judge explained his sentence at multiple hearings and in multiple memoranda. *See, e.g.*, App. C, D, and E.

In *Springer* the Tenth Circuit therefore turned to the defendant's second argument, *i.e.*, whether the sentence was substantively unreasonable, which is what defendant believes the appellate court should have done here. Once the Seventh Circuit found that the district judge would have imposed the same sentence despite knowing he made an error, the court should have proceeded to the issue of reasonableness as well.

Certainly a district judge should not be able to insulate his or her sentence by making a blanket proclamation that he would have imposed the same sentence no matter what. But that is not what the district judge did here — he addressed each and every element of § 3553(a). There needs to be a reliable order to the review, and certainly not the unique one the appellate court applied here: remanding the case with orders to send it to another judge. The next step calls for a determination of whether the sentence was substantively reasonable. If the error was harmless (*i.e.*, the judge would have imposed the same sentence), and the sentence was reasonable, it should be affirmed. If the error was harmless (the district judge would have imposed the same sentence), and the sentence was unreasonable, only then should the sentence be reversed. Reasonableness was not argued in this appeal. Yet, firm in the belief that the judge would have imposed the same sentence, the appellate court nonetheless reversed, wiping the district judge out of the picture

and virtually directing the substitute judge to impose a harsher sentence.[6]

C. *Certiorari* Should Be Granted for this Court To Determine What Constitutes "Procedural Error" And What Constitutes "Significant" Procedural Error.

The government did not address reasonableness in its briefs, which should have raised the issues of waiver or forfeiture. *See* App. A, 33a (dissenting opinion). In failing to do so, the government effectively teed up the issue raised by this petition, because the *only* way around the waiver is by a determination that procedural error precludes a reasonableness review.[7]

Before reaching that point, however, the Seventh Circuit Court of Appeals first had to find "procedural

[6] The court of appeals' conclusion that the error was "egregious" does not answer the question whether the judge's error was harmless. Error may be egregious and still be harmless, just as less than egregious error is capable of being harmful.

[7] The panel majority insisted that it was not concerned "with the leniency of the defendant's sentence as such," *see, e.g.*, App. A, 5a, yet multiple times it made clear that it did not expect the case to come back to them with probation again, even though the parties never argued whether the sentence of probation was reasonable. *E.g.*, the panel stated that the judge's comments indicated an *idée fixe* that the defendant should not receive a custodial sentence, and that the gratuity of the crime suggests that there can be no assurance that if let off with a slap on the wrist that the defendant will not commit a future crime. App. A, at 16a.

error." The Seventh Circuit found support in the Tenth Circuit's decision in *United States v. Pena-Hermosilla*, 522 F.3d 1108 (10th Cir. 2008). In *Pena-Hermosilla* the government and subsequently the appellate court determined the advisory guidelines range to be 324 to 405 months. The district judge, after rejecting two proposed enhancements, had arrived at an advisory guideline range of 188 to 235 months. He imposed a 121 month sentence. Without elaboration, the judge also stated that even if he was wrong about the enhancements and the range, he would have imposed the same 121 months sentence based on the § 3553(a) factors. The Tenth Circuit reversed, finding it "procedurally unreasonable" for a judge, without cogent explanation, to announce that the same sentence would apply even if correct guidelines calculations are so substantially different.

The analysis followed by the Tenth Circuit in *Pena-Hermosilla*, and the Seventh Circuit here, should be reviewed by this Court. Both courts arguably agree that an alternative sentence may be "procedurally unreasonable" depending on the strength of the judge's explanation. Ultimately, however, the results should be different because in *Pena-Hermosilla* the alternative guideline ranges were separated by 90 months. In the instant case, they overlapped. And in the instant case the judge made findings at evidentiary hearings and in written memoranda. The Court should review these decisions to clarify the requirements necessary to uphold alternative sentences, determine when error turns "significant," and, more particularly, what constitutes "procedural" error in the first place.

On that latter point the Seventh Circuit considers "significant procedural error" to include miscalculation of the guideline range, which is consistent with *Gall*, but to make that determination here the Seventh Circuit engaged in analysis more suited to reviewing the factors relevant to § 3553(a) and substantive reasonableness. The Seventh Circuit found three alleged sub-errors leading to the sentence: 1) the district judge misused $500,000 as the appropriate "loss" figure; 2) the district judge erroneously concluded that the defendant did not intend to cause harm; and 3) the district judge gave too much weight to the enormous number of letters written on defendant's behalf — by ordinary citizens, *not* politically connected people, as one might surmise reading the opinion — who relayed real life stories of defendant's charitable actions (not donations) in the twenty years that had passed since he held public office.

To the extent the last two justifications were meant to address the procedural integrity of the sentencing process, or even meant to address harmless error itself, neither had anything to do with procedure. The last two justifications did not involve "procedure" at all; they involved reasons the district judge gave as to why he felt a sentence that varied bellow the advisory guideline range was appropriate. Because they did not figure into the calculation of the correct advisory guideline range, they did not contribute to a "miscalculation" of the guidelines. Nor were they clearly erroneous factual findings (they were inferences the judge pulled from the facts). Either way, the unclear distinction between procedural and substantive error needs to be clarified by the Court.

Only the first justification went to the calculation of the guidelines — that the "loss" was no greater than $500,000 — but here the Seventh Circuit opinion raises questions regarding the scope of appellate court review. The appellate court agreed with the district judge with how "loss" should be calculated in this case, at least in the first instance: It is "the amount above $15 million that another bidder might have decided to pay for the property had the bidding been fair and open." App. 6a-7a. The district court viewed the issue exactly the same.

But then the appellate court applied plenary review to factual findings where abuse of discretion was appropriate. It described the error as "egregious" based on an appraisal that "corroborated" testimony of Farley and Loyola that they would have offered more. App. A, 5a-6a. The court misread the appraisal. The appraisal said that *vacant* the property was worth $16.5 million; "as is," the property was worth $14.9 million. Farley and Loyola wanted the property "as is." Smithfield paid CMS $15 million. The appraisal supported the district judge.

The appellate court believed that the district judge should have considered other expressions by Farley that it would have paid more money, throwing out figures like $18 million, but six months after it lost the deal to Smithfield, Farley made an offer to purchase the property for $15 million less a 5% commission, which was less that CMS received from Smithfield and consistent with the value of the property according to the appraisal. Shortly after losing the deal to Smithfield Farley had offered $16 million less a 4% commission (*i.e.* $15,360,00), which was also consistent with the property's value (and which, if used to measure loss, showed a lesser loss than the $500,000 alternative figure the district judge used).

By apparently lumping these issues under the rubric of procedural review, as opposed to a review of the substantive reasonableness of the sentence, the appellate court reviewed these factual matters and others using plenary review, as opposed to a review for clear error, and one that would have given deference to the findings of the district judge. *See Gall*, 552 U.S. at 51 (court considers substantive reasonableness using abuse of discretion standard). This Court should grant *certiorari* to address and create consistency in the appellate courts with respect to what constitutes procedural error, significant procedural error, and what standards are to apply in review.

D. The Court Should Grant Certiorari So That the Circuits are Consistent with Respect to What Evidence May Be Considered On Procedural Review and How That Evidence Should Be Weighed on Appeal

The Seventh Circuit opinion collapsed review of procedure with review of substantive reasonableness. This led the court to place unwarranted restrictions on the types of evidence that may be considered by district judges when it comes to imposing sentences. For instance, the Seventh Circuit disparaged charitable works as essentially irrelevant. Other circuits clearly give it credit. *See, e.g.*, *United States v. Tomko*, 562 F.3d 558 (3d Cir. 2009); *United States v. Thurston*, 544 F.3d 22 (1st Cir. 2008). Some of this disagreement results from the Seventh Circuit's collapsing the procedural and reasonableness reviews.

Basically, by collapsing the review the appellate court performed non-deferential fact-finding review under the guise of reviewing for procedural error. The appellate court disagreed with the district judge with respect to how he weighed evidence and how much weight he put into the negative evidence and how he construed the defendant's intentions; it criticized the fact that the judge seemed to think probation was appropriate before the sentencing hearing, ignoring the fact that the judge had conducted previous hearings and the fact that most judges come into a sentencing hearing with some idea of how they will sentence. It belittled defendant's charitable works, most of which had to do with actions, not mere contributions of money. All these matters should be reviewed deferentially, but the Seventh Circuit made them a part of reviewing the procedure the judge used in arriving at the sentence, thus reviewing the matters *de novo*.

This Court should grant *certiorari* to clarify the breadth of evidence that a defendant may present at sentencing and the standard of review that applies when considering the judge's findings relative to that evidence.

E. *Certiorari* Should be Granted for the Court Should Address the Issue of Government Waiver

The government made three arguments on appeal, all addressing whether the district court correctly decided that there was no "loss" in this case. The government did not address whether the district judge erred when it found an alternative loss of $500,000, and it did not address specifically the substantive reasonableness of the sentence. *See* Appendix A, 33a

(dissenting opinion). On appeal to the Seventh Circuit, defendant argued that anything other than the "loss" issue was waived. The Seventh Circuit ignored those omissions.

Waiver and abandonment should be applied equally to the government. *United States v. Quiroz*, 22 F.3d 489, 491 (2d Cir. 1994). In all cases, the failure to raise an issue or make an argument waives the issue or argument. *See, e.g., United States v. Amerson*, 185 F.3d 676, 689 (7th Cir. 1999). Failure to argue an alternative ground for a judge's decision also constitutes waiver. *See, e.g., Sepulveda v. United States Attorney General*, 401 F.3d 1226 (11th Cir. 2005), *citing United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998).

The government acknowledged, but did not challenge the alternative basis for the district judge's decision – that if the loss was not zero it was no more than $500,000. The Seventh Circuit addressed the issue completely on its own, even though the matter was waived.

The appeal in this case raises significant questions regarding waiver and forfeiture by the government, and how that waiver applies when the government appeals a sentence.

II. THE COURT NEEDS TO ADDRESS THE "EVER-WIDENING SPLIT" BETWEEN CIRCUITS THAT TREAT HARMLESS ERROR DISFFERENTLY FOR SENTENCES WITH RESPECT TO FINANCIAL CRIMES

In *United States v. Edwards*, 595 F.3d 1004 (9th Cir. 2010), Judge Bea in dissent flagged an "ever-widening split" between the Ninth Circuit and its sister circuits — specifically identifying the Seventh Circuit — with respect to finding white collar sentences unreasonably lenient. *See Edwards*, 595 F.3d at 1019-20 (dissenting opinion), and *citing United States v. Omole*, 523 F.3d 691, 698-700 (7th Cir. 2008), and *United States v. Livesay*, 587 F.3d 1274, 1278-79 (7th Cir. 2008). *See also United States v. Marsh*, 561 F.3d 81, 86 (7th Cir. 2009). The dissent also noted a split in its own circuit between review of sentences considered "too lenient" and review of sentences considered "too harsh." From the point of view of the dissent in *Edwards*, the Ninth Circuit was on a "one-way street" posted to lead sentences downward.

The position by the Seventh Circuit is the polar opposite from the Ninth Circuit. The Seventh Circuit uses a light touch when reviewing sentences above the advisory guidelines, but keen scrutiny when it comes to sentences, like the defendant's sentence, that fall below. In *Marsh*, for example, despite an error in the guidelines calculation, the Seventh Circuit Court of Appeals affirmed an above guidelines sentence because the district court stated it would have sentenced the defendant to the same sentence The court of appeals expected the district court to do here, yet in the instant

case the court of appeals not only reversed and remanded the case but directed that the new sentencing be conducted by a different judge. The difference is that the *Marsh* court varied upwards, the judge here, down.

In *Marsh* the defendant argued that the judge erred when he used certain vacated dispositions to sentence the defendant *above* the mandatory guidelines range. Because the judge indicated he would have sentenced the defendant the same under 18 U.S.C. § 3553(a), the court of appeals affirmed the sentence. *Marsh*, 561 F.3d at 86. *See also United States v. Spano*, 476 F.3d 476 (7th Cir. 2007) (error in applying guidelines harmless where judge indicated he would have imposed same *above* guidelines sentence under § 3553(a). *And see Springer*, 315 Fed.Appx 703 (10th Cir. 2009). The *Marsh* court shrugged off the argument that remand was necessary because the judge's acknowledgement of § 3553(a) was only brief. *Marsh* may also be contrasted with the Tenth Circuit decision in *Pena-Hermosilla*. The latter case involved a below advisory guidelines sentence and the court of appeals held the error was *not* harmless because the district court's explanation for sentencing *below* the advisory guidelines range was perfunctory. *See Springer*, 315 Fed. Appx 703 (explaining decision in *Pena-Hermosilla*).

As the dissent observed in the Ninth Circuit decision in *Edwards*, that Circuit and the Seventh Circuit are leaning in opposite directions. In *Edwards* the Ninth Circuit therefore affirmed a sentence featuring roughly equivalent facts as the instant matter. The defendant stood convicted of bankruptcy fraud. His advisory guideline range was 27-33 months. Focusing on the

§ 3553(a) factors, the judge sentenced him to probation with five months of house arrest. These are virtually identical facts to the instant matter, but the Ninth Circuit affirmed the sentence and the Seventh Circuit reversed.

The Seventh Circuit and the Ninth Circuit are in conflict and on different paths when it comes to sentencing. This matter as well requires consideration by the Court to insure that appellate review is consistently and fairly applied in all the circuits.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that this petition for *certiorari* be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT FILED JANUARY 29, 2010

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 09-1891

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

EDWARD R. VRDOLYAK,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 07 CR 298—**Milton I. Shadur**, *Judge*

ARGUED DECEMBER 10, 2009—
DECIDED JANUARY 29, 2010

Before POSNER, MANION, and HAMILTON, *Circuit Judges.*

POSNER, *Circuit Judge.* Edward Vrdolyak pleaded guilty to conspiracy to commit mail and wire fraud and agreed in the plea agreement that the loss intended by his fraud was between $1 million and $2.5 million. He was sentenced to five years of probation, with a

community-service obligation but no confinement, and to pay a $50,000 fine (a modest amount, because the defendant has a high income, and a net worth in excess of $1 million if his large loans to members of his family are included). The government appeals, contending that the judge miscalculated the sentencing-guidelines range applicable to the defendant's crime and committed other errors. Although a judge is no longer required to give a guidelines sentence, he is required to make a correct determination of the guidelines sentencing range as the first step in deciding what sentence to impose. *Gall v. United States*, 552 U.S. 38, 50, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007); *United States v. Gibbs*, 578 F.3d 694, 695 (7th Cir. 2009).

The Chicago Medical School (as it was then known) wanted to sell a property in Chicago that it owned consisting of a lot with a building on it. Stuart Levine was a trustee of the medical school and the chairman of the board's real estate committee, and he agreed with the defendant to use his position as a trustee to steer the sale of the property to a buyer of the defendant's choice. The defendant lined up Smithfield Properties to be the favored buyer in exchange for a $1.5 million fee that Smithfield agreed to pay him, and he in turn agreed to give Levine half the fee. The medical school was not told about this corrupt arrangement. Levine like the defendant has pleaded guilty to his part in the fraud and has agreed not to contest a prison sentence of up to 67 months that the sentencing judge might impose.

Appendix A

Smithfield's initial offer for the building—$9.5 million—was lower than two other potential buyers—the Farley Group and Loyola University—were willing to pay. The defendant advised Smithfield to up its offer, and it did, to $15 million. Farley and Loyola remained interested in buying the property. To head them off, Levine arranged for an "emergency" meeting of the medical school's board of trustees to consider offers for the property. At the meeting, although Farley had offered $15 million and Loyola $15.5 million for the property, the board, persuaded by Levine, decided to accept Smithfield's offer and negotiate no further with Farley or Loyola. The board discounted Loyola's bid because Loyola had not actually inspected the property before bidding—Levine had seen to that. The board rejected Farley's bid because Levine strongly urged approval of Smithfield's bid, noting that Farley's was lower because it included a 4 percent brokerage fee that would be deducted from the amount paid to the school. This was misleading, because Smithfield's bid was contingent on obtaining zoning approvals and Farley's was not. And a week later Farley upped its bid to $16 million, which in pure dollar terms was higher than Smithfield's even after deduction of the brokerage fee. Farley was told that it was too late.

The government was prepared to offer an affidavit from Loyola's broker that Loyola would have increased its offer had it been given an opportunity to do so. And a representative from Farley was prepared to testify that if necessary Farley would have increased its offer to somewhere between $18 and $20 million. By

convening the emergency meeting Levine had made sure that Smithfield's bid would be accepted and that he and the defendant would split the finder's fee. Although we use "bid" and "bidder" as synonyms for "offer" and "offeror," no formal auction was ever contemplated and so there was no reason to consider Farley's higher bid untimely.

The district judge concluded that the defendant's fraud had inflicted neither actual nor intended loss on the medical school. His finding that it had inflicted no actual loss was based on the fact that Smithfield's bid was the highest one considered at the "emergency" meeting. The judge gave no weight to Farley's week-later offer of $16 million and refused to consider the evidence that Farley would have bid $18 million to $20 million if given the chance and that Loyola was also prepared to offer more than $15.5 million. These rulings were erroneous. No emergency required the medical school's board of trustees to act with haste to award the sale contract. The "emergency" was a ruse to preclude competition with Smithfield.

The judge's refusal to consider the evidence of what Loyola or Farley would have done if given the chance to sweeten their bids was based on his belief that uncommunicated intentions are unworthy of consideration by a finder of fact. That is not correct. No rule of evidence or principle of common sense makes a person's testimony about his own intentions—testimony uniquely based on his personal knowledge—inadmissible in a sentencing proceeding any more than in any other

proceeding in which intention is material. *United States v. Young*, 247 F.3d 1247, 1252-53, 345 U.S. App. D.C. 432 (D.C. Cir. 2001). Who better than a potential buyer knows what he would bid for a property?

The judge himself speculated at the sentencing hearing about the defendant's uncommunicated intentions in conspiring with Levine to defraud the medical school—that he had acted out of friendship for Levine. A defendant's testimony about his uncommunicated intentions is no more credible than the testimony of an honest third party about *his* uncommunicated intentions. To believe the former and refuse even to listen to the latter is error.

The weight to be given a piece of evidence is one thing, and is ordinarily within the discretion of the trier of fact to determine. Admissibility is another matter. A judge is not permitted to have his own rules of admissibility—to say for example that "[i]n my court no exceptions to the hearsay rule will be recognized." As we shall be emphasizing throughout this opinion, our concern is not with the leniency of the defendant's sentence as such but with procedural errors committed by the judge en route to the determination of the sentence.

The judge's refusal to listen to the evidence of the potential buyers was an egregious error because the evidence was corroborated. The medical school's property had recently been appraised for $15 million on the assumption that its best use was as a luxury

residential development, a use that would require tearing down the building on the property. If the building was not torn down (an expensive undertaking), the land alone, according to the appraisal, was worth $16.5 million. Loyola didn't want to tear the building down; it wanted to use it for student housing. It had every reason therefore to offer more than Smithfield. Farley had no intention of demolishing the building either, and its intention to top Smithfield's bid was corroborated by the $16 million offer that it made for the property.

The judge was impressed by the fact that the defendant had told Smithfield that $9.5 million was too low an offer. By doing so, the judge reasoned, he had conferred a benefit on the school. But that was not the defendant's intention. His intention was to make sure that Smithfield was the winning bidder, since the finder's fee was contingent on Smithfield's getting the property. Whether in an honest bidding process the school would have obtained more than $15 million from Farley or Loyola or perhaps from some other potential buyer can't be determined with certainty because Levine prevented Farley and Loyola from keeping the bidding going and prevented everyone else who had expressed interest from even making offers.

The judge thought the defendant's interests perfectly aligned with the school's—thought that the more Smith-field bid, the more the school would receive, as well as the defendant. That is not true. The defendant did want Smithfield to be the high bidder, but he also

wanted the bidding process to be rigged, to make sure Smithfield *was* the high bidder so that he would get his fee. The result of the rigging was to prevent the medical school from considering higher bids from Farley and Loyola and perhaps others.

In determining pecuniary loss for purposes of calculating a sentencing-guidelines range, the judge is required to determine the loss that the defendant "reasonably should have known, was a potential result of the offense." U.S.S.G. § 2B1.1, Application Note 3(A)(iv). That potential loss in this case was the amount above $15 million that another bidder might have decided to pay for the property had the bidding been fair and open. As an experienced lawyer and businessman, the defendant must have known that a fair and open bidding process might well yield a higher price than Smithfield offered. In fact he knew that both Loyola and Farley wanted to pay more than Smithfield, which made sense because, as we said, both bidders wanted to use the building on the property rather than tear it down.

The judge's finding that the defendant had caused no loss blocked the alternative measure of loss in cases in which there is a loss but the precise amount of the loss cannot be determined: in such a case the criminal's gain is treated as the measure of loss. U.S.S G. § 2B1.1, Application Note 3(B); *United States v. Serpico*, 320 F.3d 691, 698 (7th Cir. 2003); *United States v. Bhutani*, 266 F.3d 661, 668 (7th Cir. 2001); *United States v. Chatterji*, 46 F.3d 1336, 1340 (4th Cir. 1995). That makes good sense

in this case. Smithfield was willing to pay $1.5 million to the defendant to obtain the property, and it must have thought that if it didn't pay that amount it would have to up its bid by at least that much to win an unrigged bidding contest. Only on that assumption did the kickback make sense from Smithfield's standpoint. From the defendant's standpoint, the more Smithfield paid, the better; but from Smithfield's standpoint, the goal of paying a finder's fee was to enable Smithfield to obtain the property for a *smaller* total outlay (price plus finder's fee) than it would have had to pay otherwise.

There was at the very least a *probable* loss, and that is "loss" within the meaning of the guideline. *United States v. Johnson*, 16 F.3d 166, 170 (7th Cir. 1994); *United States v. Schneider*, 930 F.2d 555, 558 (7th Cir. 1991); *United States v. Stanley*, 12 F.3d 17, 21 (2d Cir. 1993). It is true that cases involving probable loss usually are ones in which the illegal scheme is interrupted, so that its consequences cannot be determined with certainty. Here it was not interrupted. But the consequences still cannot be determined with certainty, and it would be even more anomalous to give the defendant a sentencing break when there is no interruption by some outside force but instead the very nature of the scheme precludes a certain determination of loss.

The gain (and thus alternative measure of the loss) was the $1.5 million finder's fee. It is true that when originally negotiated, the fee was contingent on certain factors. But by the time of the defendant's sentencing, the contingencies had been dispelled and the defendant

would have been entitled, had the scheme not been detected, to the full $1.5 million. That the fee was to be split with a coconspirator is of no significance. U.S.S.G. § 1B1.3(a); *United States v. Thomas*, 199 F.3d 950, 952-54 (7th Cir. 1999); *United States v. Boatner*, 99 F.3d 831, 834-37 (7th Cir. 1996). Dividing the gain by the number of conspirators would mean that the larger the conspiracy, the milder the punishment of each one. Anyway the defendant stood to gain $750,000 from his crime—not a negligible haul.

The zero loss found by the district judge created a guidelines sentencing range of zero to six months in prison; the correct loss figure of $1.5 million (which incidentally was within the range that the defendant agreed in the plea agreement was the intended loss attributable to his crime) ups the sentencing range to 33 to 41 months.

Ordinarily we would stop here and remand for resentencing. But the judge went on to rule that if he was wrong and there was a loss of $500,000, which would create a guidelines range of 27 to 33 months in prison, he would give the defendant a below-guidelines sentence of no prison—in fact the identical sentence that he imposed on the assumption of zero loss.

But $500,000 was also error. And while a judge can give a below-guidelines sentence, the sentence cannot stand if it is based on a legal, factual, or analytic (connecting law and fact) error that is not harmless. The court of appeals must "ensure that the district court

committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range." *Gall v. United States, supra*, 552 U.S. at 51. "The allowable band of variance [in sentencing] is greater after *Booker* than before, but intellectual discipline remains vital." *United States v. Kirkpatrick*, 589 F.3d 414, 416 (7th Cir. 2009); see also *United States v. Pena Hermosillo*, 522 F.3d 1108, 1112 (10th Cir. 2008).

The judge committed three errors in his alternative ruling. First, the $ 500,000 figure was erroneous for the reasons we've given already. The correct figure was $1.5 million and the guidelines range was therefore higher than the judge thought. Second, repeating an error in his computation of loss, the judge thought that the defendant deserved leniency because he had intended no harm to the medical school, but on the contrary had intended a benefit—that the school should receive the highest bid from Smithfield. Notice the equivocation implicit in "highest bid from Smithfield." The highest bid from Smithfield is the bid that gets Smithfield the property; it is not the highest bid the seller would have obtained had the bidding process not been contaminated by the defendant's kickback.

The judge's third error was to give, without adequate articulated consideration, enormous weight to

letters urging leniency for the defendant, while virtually ignoring the evidence that tugged the other way. There were 48 letters in all, some from members of the defendant's family and others from persons for whom he had done favors of a charitable nature, including gifts of money.

The judge committed three errors en route to deciding that the letters weighed more heavily in favor of leniency than the defendant's ethical violations as a lawyer, pointed out by the government, weighed in favor of severity. One error was his failure to discuss any of the evidence that showed the defendant's character in a bad light. A sentencing judge is not required to mention every bit of evidence presented in the sentencing hearing, but an arbitrarily one-sided commentary on the evidence raises a warning flag. The judge did not remark the defendant's discussing the kickback scheme with Levine and telling him, "If two fucking schemers like you and I can't figure this out, then we got a problem." He did not mention the conspirators' decision to evade taxes by the defendant's giving Levine's wife a "loan" at a very high interest rate with the understanding that that there was no obligation to repay; Levine's cut would come from the loan. He did not mention *Ridge Chrysler Jeep, LLC v. DaimlerChrysler Financial Services Americas LLC*, 516 F.3d 623 (7th Cir. 2008), where our defendant assisted in a fraud by litigants who had, we said, "behaved like a pack of weasels." *Id.* at 627. He did not mention the lie that the defendant had told a district judge in 2002 when he was class counsel in a successful

case and the judge had asked him whether he would be collecting any fees other than those set aside in a special lawyer's fund and he replied he would not—despite collecting $150,000 from the named plaintiffs under his contingency-fee agreement with them. The defendant had a history of ethical misconduct to which the judge without explanation gave negligible weight. Official judgments of misconduct were discounted in favor of letters procured by the defendant.

Second, the judge appears to have given no weight to the fact that the defendant is by normal standards (not Warren Buffett or Bill Gates standards) wealthy; his annual income in recent years has sometimes exceeded $1 million. Wealthy people commonly make gifts to charity. They are to be commended for doing so but should not be allowed to treat charity as a get-out-of-jail card. *United States v. Repking*, 467 F.3d 1091, 1095-96 (7th Cir. 2006) (per curiam); *United States v. Ali*, 508 F.3d 136, 149 (3d Cir. 2007); *United States v. Cooper*, 394 F.3d 172, 176-77 (3d Cir. 2005). As the court in *Repking* put it (quoting *Cooper*), "charitable works must be exceptional before they will support a more-lenient sentence, for . . . 'it is usual and ordinary, in the prosecution of similar white-collar crimes involving high-ranking corporate executives . . . to find that a defendant was involved as a leader in community charities, civic organizations, and church efforts.'" 467 F.3d at 1095. People "who donate large sums because they can should not gain an advantage over those who do not make such donations because they cannot." *United States v. Thurston*, 358 F.3d 51, 80 (1st Cir. 2004),

vacated on other grounds, 543 U.S. 1097, 125 S. Ct. 984, 160 L. Ed. 2d 988 (2005); cf. *United States v. Stefonek*, 179 F.3d 1030, 1038 (7th Cir. 1999). "To allow any affluent offender to point to the good his money has performed and to receive a downward departure from the calculated offense level on that basis is to make a mockery of the Guidelines. Such accommodation suggests that a successful criminal defendant need only write out a few checks to charities and then indignantly demand that his sentence be reduced. The very idea of such purchases of lower sentences is unsavory, and suggests that society can always be bought off, even by those whose criminal misconduct has shown contempt for its well-being." *United States v. McHan*, 920 F.2d 244, 248 (4th Cir. 1990).

Third, the judge ignored the fact that the defendant was for many years an influential Chicago alderman. Politicians are in the business of dispensing favors; and while gratitude like charity is a virtue, expressions of gratitude by beneficiaries of politicians' largesse should not weigh in sentencing. See *United States v. Wright*, 363 F.3d 237, 248-49 (3d Cir. 2004); *United States v. Serafini*, 233 F.3d 758, 773 (3d Cir. 2000); cf. *United States v. Morken*, 133 F.3d 628, 630 (8th Cir. 1998).

We are not laying down rules of sentencing. The sentencing discretion of federal judges is broad and our concern is not with the judge's having taken account of the defendant's good works but with his failure to consider the full range of evidence pertinent to a just sentence. That was an error, just like the judge's erroneous calculation of the applicable guidelines

sentencing range. Appellate review of errors committed in sentencing is plenary. *Gall v. United States, supra*, 552 U.S. at 51; *United States v. Gibbs, supra*, 578 F.3d at 695 ("we review the procedures followed by the district court de novo"). Review turns deferential when the issue is the substantive reasonableness rather than the procedural regularity of the sentencing determination. The cascade of errors and omissions that we have identified cannot be dismissed as harmless, and so requires that the defendant be resentenced.

And in fairness to the government, which is entitled to the same consideration as other litigants, the resentencing should be by a different judge. (The government did not ask us to order the case remanded to a different judge; repeat litigants—litigants who expect to appear before the same judge in the future—are for obvious reasons reluctant to request such relief. We commonly issue such orders, as we are authorized by our Circuit Rule 36 to do, without a request by a litigant.) One cannot read the 168-page transcript of the sentencing hearing, and the two memoranda attempting to justify the sentence that the judge issued *after* he had announced the sentence at the conclusion of the hearing, without sensing that the judge had committed himself irrevocably to a noncustodial sentence for the defendant. He pretty much announced this at the outset of the hearing, and he repeatedly expressed his anger with the government's lawyers over matters that did not warrant anger, such as the government's reference to the fraud as having been conducted by "insiders" (plural—Levine and the defendant). The judge said that

Appendix A

Levine was indeed an insider by virtue of being a member of the fraud victim's board of trustees but that the defendant was not, and he excoriated the government's lawyer for calling him an insider. But all the lawyer had meant was that the defendant is a prominent "insider" in the Chicago, legal, business, and political communities. For the lawyer had merely said "I will use the term insider for Mr. Vrdolyak, in the sense of someone who is connected in this City to people who are in power." And the judge kept hectoring the government's lawyers about what he viewed as their misunderstanding of the real estate business; but we cannot fathom what that misunderstanding was.

Despite patient explanation by the government's lawyers, the judge would not waver in his conviction that the defendant had acted with the best interests of the medical school in mind—which is untrue because the school's interest was to have an honest bidding process and the defendant knew it—and that the defendant had acted out of friendship for Levine, who had financial problems. (That was the Robin Hood defense.) The defendant could have assisted Levine financially without defrauding a medical school. Given the defendant's prominence, his affluence, and his professional status as a lawyer, his crime was especially gratuitous. When Levine asked for assistance in defrauding the medical school, the defendant did not hesitate and was quickly able to find a company willing to pay the kickback. He did not cooperate with the government in the investigation of the crime and did not plead guilty until the eve of trial.

The gratuity of the crime suggests that there can be no assurance that if let off with a slap on the wrist, the defendant will not commit a future crime. He has lost his law license, but the crime of which he has been convicted did not require a law license. He did not benefit from the crime—but only because he was caught.

The judge's errors in calculating the guidelines range are indicative of an *idee fixe* that the defendant was not to receive a custodial sentence, even (as the government urged in the alternative) home confinement. In *United States v. Pena-Hermosillo, supra*, 522 F.3d at 1117, the Tenth Circuit held that "impos[ing] the same sentence under an alternative rationale" had been a "procedural error," explaining that "it is hard for us to imagine a case where it would be procedurally reasonable for a district court to announce that the same sentence would apply even if correct guidelines calculations are so substantially different, without cogent explanation. In the absence of explanation, we might be inclined to suspect that the district court did not genuinely 'consider' the correct guidelines calculation in reaching the alternative rationale." *Id.* See also our decision in *United States v. Anderson*, 517 F.3d 953, 965-66 (7th Cir. 2007), where we expressed concern with "blanket" sentences.

The judgment is reversed and the case remanded for resentencing before a different judge, pursuant to 7th Cir. Rule 36. We intimate no view on what a proper sentence would be.

REVERSED AND REMANDED.

HAMILTON, *Circuit Judge, dissenting.* I agree that the district court erred in the guideline loss calculation, but I respectfully dissent because that error was harmless. The record shows an experienced district judge considering a difficult case thoroughly and exercising his discretion reasonably under 18 U.S.C. § 3553(a) to craft a sentence to fit both the crime and the criminal. The error in the guideline calculation did not affect the final decision, and I find no abuse of discretion in the final decision about the sentence.

As the majority explains, given the nature of Vrdolyak's and Levine's crime, it is more accurate to say that there was a loss that cannot be determined reliably than to say that there was no loss to the victim of the crime. Where the crime makes it so difficult to determine with confidence the amount of the loss, the guidelines and cases from this and other circuits establish that the intended gain for the conspirators is a useful substitute for loss in applying the guidelines to gauge the severity of the crime. Application Note 3(B) to U.S.S.G. § 2B1.1 provides: "The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined." That approach has been used, for example, in *United States v. Briscoe*, 65 F.3d 576, 589-90 & n.16 (7th Cir. 1995) (affirming sentence of union president who defrauded union through kickback scheme with lender to union members; loss calculation based on defendant's gain), as well as in *United States v. Vinyard*, 266 F.3d 320, 332 (4th Cir. 2001) (affirming sentence in kickback scheme based on defendant's gain),

and *United States v. Yeager*, 331 F.3d 1216, 1224-26 (11th Cir. 2003) (affirming sentence based on defendant's gain through scheme to divert drug sales through unauthorized dealers at lower prices).

But the guideline calculation is only the beginning of the story, for both the district court and this court. Pursuant to *United States v. Booker*, 543 U.S. 220, 259-60, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), after calculating the applicable sentencing guideline range, the district court was required to look beyond the guidelines and to consider the case under 18 U.S.C. § 3553(a). Congress has instructed:

> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection.

Paragraph (2) of subsection (a) requires the court to consider:

> the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and

> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.
>
> . . .

18 U.S.C. § 3553(a). The district court was required to consider the guidelines, but it was prohibited from presuming that a guideline sentence would be a reasonable sentence. *Rita v. United States*, 551 U.S. 338, 351, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007).

At the end of the lengthy sentencing hearing in this case, the district judge addressed the factors and purposes under section 3553(a). He explained how and why he had concluded that a sentence of five years' probation (which was above the guideline range he calculated), plus 2500 hours of community service and a fine, was sufficient but not greater than necessary to serve those purposes. The defendant committed a serious crime, but there were a number of factors that the district court could and did consider in mitigation. The defendant is 71 years old, had no prior criminal record, and posed little risk of repeat offenses. He had given up his law license. The crime of fraud did not involve violence, and there was no element of public corruption. The defendant had agreed to help a friend by committing the crime, but he was not the instigator of the crime and did not actually benefit from it. The district court was also impressed by a surprising volume of information showing the defendant's character was very different from his public image in the media. That

information showed generosity with time, money, and influence to help people in need, especially where the defendant had no moral or other obligation to help them and where he received no publicity or recognition for his kindnesses. That is not the entire picture, of course, but those are all factors that could reasonably lead the district court to exercise its discretion under section 3553(a) to impose the sentence that it did. See *Gall v. United States*, 552 U.S. 38, 48-49, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007) (affirming below-guideline sentence of probation and recognizing substantial restrictions on liberty imposed by sentence of probation).

Under *Booker* and *Gall* the district court is required to calculate the applicable sentencing guidelines for the crime and the criminal, and an error in the calculation is a procedural error in sentencing that may require a remand. *Booker*, 543 U.S. at 259-60; *Gall*, 552 U.S. at 49-51. At the same time, however, it is clear that errors in calculating the advisory guideline calculations are subject to harmless error analysis. *E.g.*, *United States v. Abbas*, 560 F.3d 660, 666-67 (7th Cir. 2009) (holding guideline error was harmless); *United States v. Anderson*, 517 F.3d 953, 965-66 (7th Cir. 2008) (same); see generally *Williams v. United States*, 503 U.S. 193, 203, 112 S. Ct. 1112, 117 L. Ed. 2d 341 (1992) (stating before *Booker* that guideline errors were subject to harmless error analysis). In both *Abbas* and *Anderson*, the district courts recognized the disputed guideline issues, stated that their sentences would be the same regardless of how the guideline issues were decided, and provided thoughtful explanations of their reasoning.

In such cases, because the sentencing guidelines are no longer mandatory, appellate courts should readily find that guideline errors are harmless.

Correct application of the guidelines can present many difficult or esoteric questions, including many that have little to do with the ultimate legal and moral judgment about an appropriate sentence. Since *Booker*, this court has often recognized that the sentencing judge may impose a reasonable sentence under section 3553(a) regardless of how a difficult guideline issue might be resolved. "When a judge proceeds in this manner, she must make clear that the § 3553(a) factors drive the sentence without regard as to how the prior conviction fits under a particular guideline. Doing so will make the often nit-picking review of issues like this under our now advisory guideline scheme unnecessary." *United States v. Sanner*, 565 F.3d 400, 406 (7th Cir. 2009) (affirming above-guideline sentence without regard for correct resolution of guideline issue); *Abbas*, 560 F.3d at 666-67 (finding that district court erred in guideline calculation but holding error was harmless based on judge's explanation of alternative basis for same sentence). In this case, the judge considered the relevant factors thoughtfully and made his intentions and reasons clear. The precise level of loss in the judge's alternative guideline calculation did not drive the final decision.

As *Abbas* and *Anderson* make clear, this is not to say that a district court can insulate any sentence from appellate review by saying a few magic words about section 3553(a). *Abbas*, 560 F.3d at 666-67; *Anderson*,

517 F.3d at 965; accord, *United States v. Pena-Hermosillo*, 522 F.3d 1108, 1118 (10th Cir. 2008) (finding guideline error was not harmless where district court provided only "perfunctory" explanation for alternative rationale); see generally *United States v. Williams*, 431 F.3d 767, 773-76 (11th Cir. 2005) (Carnes, J., concurring) (encouraging district courts to provide alternative sentencing rationales where resolution of disputed guideline issues would not affect sentences). But where the record shows that the district court considered the disputed guideline issue, considered the prospect that its decision on the issue might be wrong, and provided a thoughtful explanation of its reasons under section 3553(a), it should be relatively easy to find that an error in calculating an advisory guideline was harmless, as I believe this one was. In some important respects, this case provides a mirror-image of *United States v. Spano*, 476 F.3d 476 (7th Cir. 2007), a public corruption case in which the district court imposed a sentence on one defendant that was substantially higher than the proper guideline range. The district court imposed an upward departure of four levels for extraordinary abuse of trust, and this court held that the decision was an error. We found that the error was harmless, however, because the judge explained why he thought a guideline sentence that did not take into account the egregious abuse of trust would not be adequate. Despite the guideline error, we upheld the above-guideline sentence as a proper and sensible exercise of the district court's discretion under section 3553(a). *Id.* at 480-81. In this case involving private corruption, the district court imposed a sentence below the correct guideline range, but with a reasonable exercise of that same discretion.

Appendix A

The majority identifies three reasons why the loss calculation error should not be deemed harmless and concludes further that the case should be remanded to another district judge under Circuit Rule 36 to ensure the government a fair hearing. In my view, the criticisms here are not warranted, and the government received a fair hearing before the district court.

First, the majority criticizes the district court for basing the alternative sentencing rationale on the assumption that the guideline loss could have been no higher than $500,000, which would put the sentencing guideline range two offense levels lower than the correct range here.[1] The district court's thorough discussion of the factors relevant to sentencing under section 3553(a) showed that the two-level difference would not have made any difference in the court's ultimate decision, so the error in calculating the loss under the guidelines had no effect. The sentencing range that is 14 levels below level 20 (the correct level) is the same as the range that is 14 levels below the level 18 the district court considered as its alternative—zero to six months in prison. And in fact, though we reach the conclusion from

1. The correct guideline calculation starts with a base offense level of 6 under U.S.S.G. § 2B1.1(a)(2), adds 16 levels under § 2B1.1(b)(1)(I) for a loss of more than one million dollars, and subtracts two levels for acceptance of responsibility under § 3E1.1(a), for a total offense level of 20. With Vrdolyak's criminal history category of I, the sentencing guideline range is 33 to 41 months in prison. Using a loss of $ 500,000, the district court assumed an upward adjustment of 14 and a total offense level of 18, with a guideline range of 27 to 33 months in prison.

opposite directions, the majority and I agree that there is no point in remanding the case to Judge Shadur for a new guideline calculation and imposition of the same sentence as before. Where the majority sees a "cascade of errors and omissions," I see just one harmless error in the advisory guideline calculation.

Second, the majority criticizes the district court for believing the defendant intended no harm to the medical school and actually intended to benefit it by arranging for the highest bid from Smithfield. This criticism does not accurately reflect the record. On the first point, the district court pointed out correctly that there was no *evidence* that the defendant intended to hurt the medical school, see Gov't App. at 25, and the government itself had submitted evidence showing that the defendant had wanted Smithfield to pay "top dollar" for the property. See Def. Reply Mem. at 8 (quoting recorded conversation on March 31, 2006). The district court necessarily recognized, however, that the defendant must have realized that his help for his friend Levine would hurt the medical school by distorting the sale process in favor of the corrupt side deal to benefit Levine and the defendant. That's why the defendant is guilty. That's why the district court accepted his plea of guilty. On the second point, the furthest the district judge went was to note several times that the defendant's "finder's fee" (10 percent of the purchase price, to be split with Levine) would go up as Smithfield's purchase offer went up. Gov't App. 21-22, 25. I do not find in the record any indication that the district judge thought that the defendant, who had pled guilty to a

serious crime and whom he was sentencing for that crime, acted with the intent to benefit the medical school. The district judge understood how Levine and Vrdolyak had corrupted the sale process—Vrdolyak had pled guilty, after all.

Third, the majority criticizes the district court for giving too much weight to numerous letters urging leniency in sentencing while giving too little weight to information that hurt the defendant's cause. On this topic, the majority identifies three more specific errors: failing to discuss adequately the information weighing against the defendant, failing to consider the defendant's wealth and its effect on his ability to show mitigating good works, and ignoring the defendant's earlier work as an influential Chicago alderman.

These criticisms are not warranted. The record shows that the district court gave careful and discriminating consideration to the mitigating and aggravating information. The letters in mitigation came from the defendant's family and friends, and from others who described ways in which the defendant had helped them over the years. The district judge said that those letters were an "extraordinary outpouring that's not matched—at least in my recollection—in any other case that I have had coming up to be 29 years on the bench." Gov't App. 76.

Like victim impact statements, such letters are entirely appropriate in a sentencing hearing. Cf. *Gall*, 552 U.S. at 43 (affirming below-guideline sentence of

probation where district court relied in part on "small flood" of letters from family, friends, neighbors, and business associates). The district court has an obligation to consider such letters when considering the history and characteristics of the defendant. See 18 U.S.C. § 3553(a)(1). Such letters often add little to the relevant picture of the defendant and his crime, but sometimes they can provide unexpected information and add new insights into the defendant's character.

This was such a case. The veteran district judge was surprised by what he learned. Like almost everyone who has lived in Chicago over the past three or four decades, the judge had been generally aware of the reputation of "Fast Eddie" Vrdolyak, leader of the opposition to Mayor Harold Washington and power broker in Chicago politics. The judge did his best to put aside those preconceptions and to approach the sentencing decision with an open mind. He explained candidly:

> When I first encountered the case, and throughout its pendency, I never expected that I was going to reach the destination that I find called for here. And as I have indicated, I had (as I suspect anybody who has seen the political environment in Chicago over a long time frame probably shared) a perception of our defendant today that I suppose is epitomized by the moniker "Fast Eddie," indeed from the so-called Council Wars that existed during the Harold Washington mayoralty.

Gov't App. 135-36. In explaining that he would have reached the same result regardless of the guideline loss calculation, the judge said:

> In any event, the point I think that is most important is that when I applied 3553(a) I would reach the same result whichever of those views [about loss under the guidelines] is taken. And that's because I again surprised myself in terms of how I looked at this thing coming in, with the absence of a full appreciation or full understanding or disclosure of what the thing involved. I would not have dreamed of imposing a noncustodial sentence. But I have got to tell you that when you look at the 3553(a) factors, it seems to me that the reasonable result, the one that is called for taking all of the considerations into account, is just what I have indicated.

Id. at 138. These frank observations of the judge—about the ways in which the facts overcame the defendant's public reputation and persuaded the judge to reach a result he had not expected to reach—deserve substantial weight.

Contrary to the majority's criticisms about failing to consider the defendant's wealth and influence, the district judge was discriminating in weighing the letters

about the defendant's character. During the defense presentation, the judge commented:

> I am not sure that things that are done for family members carry—or for that matter for what's called a public persona carries—much weight. *At least as I read these letters, the thing that I found frankly most persuasive on his part were the things that were not visible, and things in which at least according to these people he reached out in situations where he need not have done so. He had no obligation to do that either morally or otherwise and did it anyway.* And that's frankly the reason that I characterized the letters that I received—not simply in terms of volume, but in terms of impact—as giving the kind of astonishingly different portrayal than what you have characterized as public persona.

Gov't App. 93 (emphasis added).

The most important mitigating information here involved not the "checkbook charity" that can be easy for the wealthy, but many instances in which the defendant provided hands-on help in long-term relationships with people in need, or where he provided generous help anonymously. The district judge's comments show that he was much more impressed by

these many instances of the defendant's generosity and kindness with his time and influence in situations where there was no visibility or public reward for his actions.[2]

Even with the appropriate discounting desired by the majority, the letters still have unusual persuasive weight, and the district court was not required to ignore or discount the evidence of past good works. The majority's observation that wealthy defendants should not get a break compared to poor ones merely because they have given away some of their wealth is certainly true but misses the district court's real point in weighing this mitigating information.

The majority writes that the district court "ignored the fact that the defendant was for many years an influential Chicago alderman." Slip op. at 13. This fact is relevant, the majority asserts, because politicians are in the business of dispensing favors, so that later expressions of gratitude for politicians' largesse should not be given weight in a sentencing decision. This

2. "But, surely, if ever a man is to receive credit for the good he has done, and his immediate misconduct assessed in the context of his overall life hitherto, it should be at the moment of his sentencing, when his very future hangs in the balance. This elementary principle of weighing the good with the bad, which is basic to all the great religions, moral philosophies, and systems of justice, was plainly part of what Congress had in mind when it directed courts to consider, as a necessary sentencing factor, 'the history and characteristics of the defendant.'" *United States v. Adelson*, 441 F. Supp. 2d 506, 513-14 (S.D.N.Y. 2006), *aff'd mem.*, 301 Fed. Appx. 93 (2d Cir. 2008).

criticism is not warranted. The defendant left public office more than 20 years ago, long before most of the events cited in mitigation. His history in Chicago politics and public life certainly did not escape the district judge's notice. The district judge's comment quoted above—discounting letters about things the defendant had done for his "public persona"—shows that the district court was quite conscious of precisely the point the majority faults him for ignoring. See also Gov't App. 137 (court referring to "the extraordinary volume and character of the things that I received in support of Mr. Vrdolyak, the kinds of thing that the public persona would never have dreamed existed, and I certainly not"). In other words, the letters that impressed the court most were those addressing private actions that were not designed to help the defendant himself, in his private or public life.[3]

The majority criticizes the district court for not saying more about evidence putting the defendant's

3. The letters of Dr. Mark Siegler and others described several instances in which the defendant intervened to enable needy people to obtain live-saving medical care that was not otherwise available to them. See Def. Ex. N (Siegler). The letter of Jonathan Kleinbard, a former vice president of the University of Chicago, told of a case in which Vrdolyak represented a plaintiff suing the University of Chicago Medical Center for medical malpractice. Vrdolyak failed in his effort to settle the case with Kleinbard's help, and he eventually won a judgment "in the millions of dollars." Kleinbard reported that Vrdolyak then donated his entire legal fee to the University of Chicago Medical Center. Def. Ex. Z.

character in a bad light. The district court showed that it was familiar with the evidence the government had submitted, including the incidents cited from the defendant's legal career. The court acknowledged the "substantial information that's unfavorable to Vrdolyak" and said it was reminded of Dr. Jekyll and Mr. Hyde, as defense counsel urged a sentence for Dr. Jekyll and the government urged a sentence for Mr. Hyde. Gov't App. 76. The court specifically asked the defense to address the lawyer disciplinary matters, *id.* at 127, and the defense provided explanations that offered at least some mitigating effect. *Id.* at 128-29. Criticism of the district court for having failed to say more about these events, which had been the subject of two censures and one short suspension from practice, demands too much from an oral sentencing explanation.

Based on what is described as a "cascade of errors and omissions," the majority orders a remand under Circuit Rule 36 to another district judge for a fresh look at the sentence. I see instead just one harmless error, and I do not believe the government was denied a fair hearing. The majority concludes that Judge Shadur "had committed himself irrevocably to a noncustodial sentence for the defendant." Slip op. at 14. The majority criticizes the judge for having announced this view near the outset of the sentencing hearing, before the government had a chance to argue for a custodial sentence. This criticism is off target for two reasons.

First, it fails to acknowledge how much work the parties and the district court had put into the sentencing

decision before the hearing itself. In detailed written briefs, the parties had set forth their positions on the guideline issues, the section 3553(a) factors, and the sentence that would be appropriate. The district judge's comments throughout the sentencing hearing show that he fully understood the parties' positions from the outset. Having done such extensive preparation, it would have been unusual for the judge not to have had a good idea how he intended to sentence the defendant, and why, at the beginning of the sentencing hearing.

Second, the fact that the judge signaled his informed inclinations early in the hearing does not call for criticism. Most lawyers appreciate knowing more rather than less about the judge's thinking while there is still an opportunity to persuade the court. This criticism is no more warranted than would be criticism that an appellate judge had a view of the case at the beginning of an oral argument. Such views do not mean that minds are closed to further persuasion by probative evidence and legal argument. See also Gov't App. 76-77 (district court inviting views and stating "I really have not reached a conclusion"). Judges must keep their minds open to new information that will change their thinking, as the district judge did in this case. And where the majority finds in the record a district judge who was without justification impatient and angry with the government, I find a frank and wide-ranging discussion of the issues in the case, and some reasonable annoyance

with overly aggressive arguments and invitations to speculate.[4]

Perhaps the most remarkable thing about the way this case has proceeded on appeal is that the government's briefs did not challenge the reasonableness of the sentence or ask for remand to a different judge. In its opening brief, the government argued only the guideline loss error. The government did not even bother to mention the district court's alternative guideline calculation and analysis under 18 U.S.C. § 3553(a). Where the district court has stated such an alternative basis, we should treat the appellant's silence as at least a forfeiture of the issue. And it is hard to believe that the government's approach to this appeal was not carefully considered in every respect. We would be justified in finding a waiver based on the government's failure to address the alternative calculation and its failure to challenge the reasonableness of the sentence.

Finally, although it is evident that the majority views the sentence here as simply not heavy enough to punish this crime adequately, we should not overlook an important dimension of this sentence that may in the

4. The majority criticizes the district court for refusing to consider after-the-fact evidence from other interested buyers about how much more they would have been willing to offer for the property. I see no abuse of discretion in the district court's decision not to spend time on the government's speculative effort to show the likely result of an honest effort to have sold the property for the best available price.

end be more powerful than a shorter prison term. The idea of a person as prominent as Ed Vrdolyak doing 2500 hours of community service in Chicago has elements of public shaming and service that were well within the district court's discretion in deciding how best to accomplish the purposes of sentencing with a sentence "sufficient, but not greater than necessary," as section 3553(a) directs. It is hard to imagine that this defendant's community service could be completed without considerable news media attention, which would add to the deterrent effect of that portion of the sentence.

In sum, the record here shows that an experienced judge considered the case thoughtfully and learned information that overcame his initial inclinations in the case (and many public reactions to the case). The judge exercised his discretion under section 3553(a) and imposed a sentence reasonably tailored to fit both the crime and the criminal. Though the majority and I disagree with the district judge on the loss calculation under the advisory sentencing guidelines, that error was harmless because it did not drive the final sentencing decision under section 3553(a). I would affirm the district court's judgment.

APPENDIX B — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION FILED MARCH 10, 2009

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 07 CR 298

UNITED STATES OF AMERICA,

Plaintiff,

v.

EDWARD R. VRDOLYAK,

Defendant.

MEMORANDUM

This Court has received the "Government's Offer of Proof" following the completion of the sentencing of defendant Edward Vrdolyak ("Vrdolyak"). This supplemental memorandum is being issued because that offer regrettably mischaracterizes the record before this Court at the time of sentencing in some material and important respects.

First, the recital in Part I of what is captioned "The Farley Group's Several Offers and Efforts To Purchase the Scholl Property" does accurately reflect what was

before this Court as to the Farley Group's *earlier* efforts to purchase the property at 1001 North Dearborn Street, Chicago from the then Chicago Medical School ("CMS")—that is, the efforts that preceded the June 5, 2003 emergency meeting of the CMS Board that was called to decide on the sale of that property. But the first sentence in Government P11 simply does not conform to the facts. Instead, for sentencing purposes this Court expressly found on the basis of the objective evidence before it—as contrasted with what may have been in Pam Farley's mind (Government P11) or what "[t]he Farley Group did not consider" its increased offer, made a week *after* the Board meeting, to be (Government P13)—that the Farley Group had indeed been requested to submit its best offer before the June 5 meeting, directly contrary to what is stated in Government P14.[1]

Moreover, although to this Court's recollection none of the parties' submissions (including the government's current offer of proof) had called this fact to this Court's attention, Vrdolyak's post-sentencing offer of proof states that all Farley Group offers (wholly unlike

1. Any attempted collectivization of the "Farley Group," rather than focusing on individuals, is another indicium of the weakness of the government's position. Significantly, whatever she may now profess as to her state of mind, the fact is that Pam Farley herself never communicated with the CMS people—rather, all communications were between the Farley Group's broker referred to here and the CMS people or their lawyers. Revisionist history is not the stuff of which judicial decisions are—or should be—made.

Smithfield's) were made subject to CMS's payment of a broker's commission. This Court does not recall having seen the May 30, 2003 "Agency Disclosure and Commission Agreement for Unrepresented Seller," submitted by the Farley Group's broker to CMS, until it received Vrdolyak's post-sentencing offer of proof. But if that document, calling for CMS's payment of a 4% broker's commission, had indeed been intended as a condition of the broker's June 2, 2003 letter offer on behalf of the Farley Group, that $ 15 million offer (made just before the June 5 meeting) would have netted $14.4 million to CMS (after the 4% commission), *less than* Smithfield's $15 million figure.

To return to the "best offer" subject, that same broker (who acted throughout on behalf of the Farley Group) had long since told the government, when she was interviewed, that she recalled having been asked to "prepare the Farley Group's best offer" and to submit it to CMS's counsel in anticipation of an early decision. Some added indication of the lack of force in the Government's effort to rely instead on matters that it ascribes to the Farley Group's asserted mindset—uncommunicated to CMS—is exemplified by Government P12, which seeks to find support in its lame assertion that nothing in the letter sent to the Farley Group's broker the day after the meeting "referred to the Farley Group's June 2 offer as a best or final offer." It is a total non sequitur to ascribe any significance to that purported omission, for there would obviously have been no reason—given the content of that letter—for the CMS representative to include such a statement.

Appendix B

Similarly, Government Ex. 1 (a June *12* Letter of Intent submitted by the broker on behalf of the Farley Group) is obviously a weak reed on which to place any stress whatever. In that respect, by pointing to that after-the-fact submission the government has simply attempted to add to its earlier reliance on the uncommunicated asserted mindset of the Farley Group as of the time of the June 5 CMS Board meeting. That effort—a kind of post hoc, ergo propter hoc contention—carries no persuasiveness.

Indeed, it bears emphasis that Government P18 (which is included in Part II, "Loyola University's Offer To Purchase the Scholl Property") specifically reflects the directive given to Loyola University's real estate representative and advisor Michael Haney *before* the June 5 meeting, a directive that directly supports the finding made by this Court. And Vrdolyak's offer of proof sets out that a member of Loyola's Board of Trustees has confirmed that the identical message was conveyed to him by Stuart Levine, also before the June 5 emergency meeting. No reason exists that CMS would treat the two interested parties, Loyola University and the Farley Group, differently in that respect.[2] It is truly regrettable to find the government sponsoring the after-the-fact, self-serving and unverifiable characterizations by Farley Group representatives as though they provided an accurate portrayal in the face of this Court's contrary determination.

2. Indeed, that same message—asking for *its* best offer—was conveyed to Smithfield as well during the same time frame.

Appendix B

As for the Loyola University situation, what must not be forgotten is that the defendant before this Court for sentencing was Vrdolyak, not Stuart Levine. And the relevant question, both for Sentencing Guideline purposes and ultimately for purposes of considering and applying the 18 U.S.C. § 3553(a) ("Section 3553(a)") factors, is what claimed loss to CMS is ascribable to *Vrdolyak*.

On that score the uncontroverted fact is that Vrdolyak had every incentive—not out of altruistic motives, but in his own interest—to maximize the Smithfield offer, to make sure that it represented the fair market value of the property. After all, it was only if Smithfield proved successful in acquiring the property that Vrdolyak would receive a finder's fee for having produced it as a prospective purchaser. And that self-interest was directly confirmed by Vrdolyak's actual conduct: When he learned that Smithfield had sought to acquire the property for a much lower price ($9.5 million) and that others had indicated an interest at a much higher figure, it was his angry insistence that caused Smithfield to up the price to the $15 million figure contained in its revised offer. If knowledge of higher numbers coming from other interested parties had come to him, his prior conduct provides every assurance that—again in his own educated self-interest—he would have urged that Smithfield up the ante accordingly. In that respect it is the government's stubborn refusal to focus on Vrdolyak, the only defendant before this Court, that has continued to warp its presentations.

Appendix B

Importantly, even if the Sentencing Guidelines' concept of "loss" were found to encompass the added $500,000 referred to in the letter from Loyola University's broker (despite the conditions implicit in that letter, including the fact that Loyola's Board had not approved the proposal (and had not even inspected the property) before the June 5 meeting, and despite the other factors that typically lead any seller to choose a buyer that is much farther along in the process of shaping a purchase transaction over one who might or might not come through at a higher number),[3] the facts regarding Vrdolyak's role, plus all of the other factors set out in Section 3553(a), would still heavily outweigh that advisory figure. Hence the sentence that this Court has imposed would remain sufficient but not greater than necessary to comply with all the purposes set forth in Section 3553(a)(2)(as well as satisfying the other provisions of Section 3553(a)) even under that hypothetical.

Two final matters should be adverted to briefly, though with regret. At the time of sentencing the government identified the matters on which it proposed to offer proof—the areas that this Court has dealt with in this memorandum. Under the circumstances this Court determined that could be done by a post-sentencing written offer of proof to flesh out the record

3. It again bears repeating that the government's extremist position of also characterizing the Vrdolyak finder's fee as a "loss" to CMS has no warrant either in practice or in the evidence before this Court.

to cover those matters, which the parties had addressed in their very extensive pre-sentence submissions.

That being so, there is no justification whatever for the government's inclusion, as part of its current submission, of the footnoted information at Government P26 n.2—something that had never been brought before this Court in the way of government argument or otherwise (it seems to be an effort to muddy up Smithfield post hoc, and it really occupies no legitimate place in the government's submission).

Lastly, Government P29 states that Smithfield's representative who signed the Compensation Agreement with Vrdolyak "does not recall ever discussing the finder's fee as a percentage of the purchase price." Throughout the parties' presentation to this Court it had been this Court's understanding that the finder's fee was 10% of the Smithfield offer for the property—and to this Court's recollection no one ever sought to suggest that this Court's repeated references to that understanding were somehow mistaken. But again what is critical and controlling is the point already made—that Vrdolyak's entitlement to *any* finder's fee was totally dependent on Smithfield being the successful purchaser of the property, and again that gave him common cause with CMS in seeking to provide it with full fair market value for its property.

/s/ Milton I. Shadur
Milton I. Shadur
Senior United States District Judge

Date: March 10, 2009

APPENDIX C — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION FILED MARCH 4, 2009

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 07 CR 298

UNITED STATES OF AMERICA,

Plaintiff,

v.

EDWARD R. VRDOLYAK,

Defendant.

MEMORANDUM ORDER

During the March 3, 2009 hearing in which this Court was provided with the information necessary for completion of the judgment and commitment order in this case, counsel for defendant Edward Vrdolyak ("Vrdolyak") was asked whether his review of the Presentence Investigation Report ("PSI") had identified any of its provisions that needed correction. Counsel's response referred to the government's claim of asserted loss to the victim (then known as Chicago Medical School, referred to in the PSI as "CMS"), as

described at PSI 4:131 to 5:144.[1] Because that description accurately reflects the government's position—a position that this Court has both rejected and explained in detail its reasons for such rejection—there is no need to modify the PSI in that respect. But this memorandum order goes on to identify (1) two brief aspects of the PSI that are erroneous and need correction and (2) a major section of the PSI (the calculation of the advisory Sentencing Guidelines) with which this Court does not agree.

First as to the brief items needing correction:

1. PSI 3:85-86 states incorrectly that "Smithfield agreed to pay the defendant and Levine a ten percent fee upon the purchase of the property." To the contrary, Smithfield's Compensation Agreement for the payment of a finder's fee was entered into only with Vrdolyak—Smithfield had no knowledge of Levine's involvement in that respect.

2. PSI 3:88-89 states:

> Initially, Smithfield offered $9.5 million, but, when other bids were submitted for $15 and $15.5, Smithfield increased the bid to $15 million.

1. In all references to the PSI, the number preceding the colon designates the page and the number following the colon designates the line number.

> That use of the term "bids" is potentially misleading. In fact the expressions of interest by other prospective purchasers of the 1001 North Dearborn property (the Farley Group and Loyola University) had not taken the form of bids in the sense that CMS had put the property out for bids at that time, though it is certainly true that Smithfield's increase of its offer from $9.5 million to $15 million was the result of Vrdolyak's anger when he heard about the substantial disparity between the Smithfield offer and those expressions of interest by the other parties.

Those provisions should be edited accordingly.

As for the major component of the PSI that this Court has disapproved, it relates to the Guideline calculation from PSI 6:172 through 7:218 and 7:224 to 7:230. With those sections eliminated from consideration because of the absence of proof of any loss sustained by CMS as the result of Vrdolyak's conduct, the two-level reduction for acceptance of responsibility (Guideline § 3E1.1(a)) reduces the total offense level to 4. This Court has sentenced Vrdolyak on that basis and has prepared the judgment and commitment order accordingly, although it has also ruled that even if the advisory Guideline calculation had been conformed to a modified form of the government's version (the government's actual position, as carried forward into the PSI, was impermissibly excessive), the sentence called for by a proper application of the 18 U.S.C. § 3553(a) factors would have been the same one pronounced by this Court.

Appendix C

/s/ Milton I. Shadur
Milton I. Shadur
Senior United States District Judge

Date: March 4, 2009

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED MARCH 18, 2010

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

March 18, 2010

Before

Richard A. Posner, *Circuit Judge*

Daniel A. Manion, *Circuit Judge*

David F. Hamilton, *Circuit Judge*[*]

No. 09-1891

UNITED STATES OF AMERICA,

Plaintiff Appellant,

v.

EDWARD R. VRDOLYAK,

Defendant Appellee.

[*] Circuit Judge David F. Hamilton voted to grant the petition for rehearing.

Appendix D

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division

No. 07 CR 298

Milton I. Shadur, *Judge*.

ORDER

On February 12, 2010, defendant-appellee filed a petition for rehearing with suggestion for rehearing *en banc*, and on March 4, 2010, plaintiff-appellant filed an answer to the petition. The majority of the judges on the original panel have voted to deny the petition, and none of the judges in regular active service has requested a vote on the petition for rehearing *en banc*.** The petition is therefore DENIED.

** Circuit Judge Joel M. Flaum did not participate in the consideration of this petition for rehearing.

APPENDIX E — EXCERPTED TRANSCRIPT OF PROCEEDINGS DATED FEBRUARY 26, 2009

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOCKET NO. 07 CR 298

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDWARD R. VRDOLYAK,

Defendant.

Chicago, Illinois
February 26, 2009
9:30 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE MILTON I. SHADUR, Judge

[Commencing at page 131]

* * *

community confinement or work release or community service that your Honor would find acceptable.

Thank you very much, your Honor.

Appendix E

THE COURT: Mr. Vrdolyak, is there anything that you would want to add that you didn't think you have enough opportunity to present in response to the government's position?

DEFENDANT VRDOLYAK: I have to check with my son. No.

Thank you.

THE COURT: Thank you.

Let's take a recess for about 15 minutes, and then we will resume.

(Brief Recess)

(Whereupon the following proceedings were had in open court)

THE COURT: It's a mistake to be oversimplistic, or even to approach that, in a case that has the kind of complexities that are reflected by the sharply opposing views that I have heard from defense counsel and government counsel. And it is usually not accurate to speak of surprises when judges are trained as we are to apply both our knowledge and our experience to the cases that come before us.

Indeed, it's even more unusual when we surprise ourselves. When I first encountered the case, and throughout [132] its pendency, I never expected that I

was going to reach the destination that I find called for here. And as I have indicated, I had (as I suspect anybody who has seen the political environment in Chicago over a long time frame probably shared) a perception of our defendant today that I suppose is epitomized by the moniker "Fast Eddie," indeed from the so-called Council Wars that existed during the Harold Washington mayoralty. I suppose that carried with it a suspicion that I think was suggested by the media of, for example, possible racism.

I should say parenthetically that in the ancient past, when I was the Secretary of the Chicago Bar Association and accordingly a member of its Board of Managers — that preceded the days of the ARDC — we were the ones who had the responsibility for recommending lawyer discipline to the Illinois Supreme Court, which then as now had the final say. And who came before the Board at the time that I was Secretary but Harold Washington, who at that time was guilty of taking money from clients. Small amounts, but even worse, small amounts from people who couldn't afford the small amounts. And I was one of the minority that recommended stronger discipline for Mr. Washington, than the majority finally came up with, and as you see it didn't deter his ultimate career. But I suppose that anything is possible in Chicago.

But in any event, apropos the point that I have made, [132] I would commend to anyone something that Mr. Monico called attention to. And that is one of the letters that came in, the one that he said in many ways

was one of the most powerful. That came from Barrack Echols, who is now and has been a litigation partner at Kirkland & Ellis, and he has been at Kirkland since 1999. And if you read the things that Mr. Vrdolyak did in his situation, with no motivation other than just trying to advance this young man's career, any suspicion, for example, of racism that really may have been promoted goes out the window. But that's really in a sense a side issue. What is not a side issue is the extraordinary volume and character of the things that I received in support of Mr. Vrdolyak, the kinds of thing that the public persona would never have dreamed existed, and I certainly not.

Now if I may shift to the sentencing concept itself, I have already expressed myself on the Sentencing Guidelines and the odd way in which they define loss, and the even more odd way in which, with this particular crime, they operate in a situation in which the loss if Mr. Levine were before me would be dramatically different from the loss as defined in the Guidelines with Mr. Vrdolyak before me.

Now what we get, as you have heard from Mr. Niewoehner, is a statement that says, "Well, if the loss is to be determined in that way (or absence of a loss), it understates the seriousness of the offense." And the message [134] that I have gotten from defense counsel has been, "Well, if loss were to be calculated in the way that the government would urge" — and I am not talking about $2 million, which is just beyond belief, but rather, for example, the idea that maybe a half million would be

a measure of loss as basically argued, because of the proposal that had come in, and that would then convert the thing, as I have said, to a lesser level, the defense position would be "Well, that overstates the seriousness of the offense."

In any event, the point I think that is most important is that when I applied 3553(a) I would reach the same result whichever of those views is taken. And that's because I again surprised myself in terms of how I looked at this thing coming in, with the absence of a full appreciation or full understanding or disclosure of what the thing involved. I would not have dreamed of imposing a noncustodial sentence. But I have got to tell you that when you look at the 3553(a) factors, it seems to me that the reasonable result, the one that is called for taking all of the considerations into account, is just what I have indicated.

Now in a sense the Guideline things present kind of a problem in one way. And that is if you think of it as zero loss, I think that that would probably reduce the Guideline when you give two points for acceptance of responsibility to below six, which if you look at the [135] availability of probation would limit probation to three years. And frankly I don't think that's enough in terms of the conditions that I think ought to be imposed. So my sense is that at least, although it may not carry full logic, the loss ought to be sufficient as the nominal amount to carry the net offense level to a six, which them permits the imposition of five years of probation.

Appendix E

Nobody has talked much about the conditions that ought to apply, the government understandably because it's strongly opposed to that kind of sentence, the defendant because they talked briefly but not fully on the subject. Before I turn to that, let me go through, as I should, the 3553(a) factors. And as I have commented in the past, I usually start at the back end and move forward — not because I am a Hebrew scholar, I am not, but rather because so often the later provisions of 3553(a) play a lesser role than the ones that we ultimately end up with, which are 3553(a)(2) and 3553 (a)(1). So let me start at the back end.

And 7 talks about the need to provide restitution to any victims of the offense. My determination is that that does indeed apply. At worst, unless I hear something that is very different if we get further input, and I am not sure that it would make an ultimate difference, I would find that the measure — the maximum measure — of restitution would have been for him to turn over the potential for the ill-gotten [136] gains that we are talking about. That, as I say, the government has been perceptive enough to include as one of the obligations, and Mr. Monico has represented that has in fact been done. If Smithfield has the perception that no payment is due because of the circumstances involving Mr. Vrdolyak, the short answer is then he would not have sustained a gain. And accordingly the restitution is for better or worse whatever that contract does provide, and not somehow something that is not tied to that.

Appendix E

If I may turn to 6, 6 talks about the need to avoid unwarranted sentence disparities among defendants with similar records, who have been found guilty of similar conduct. And my typical comment about 6 is that of course the catch in that one is that it uses the term "unwarranted." And "unwarranted," I suppose, like beauty, is in the eye of the beholder. And accordingly there is nothing that I have had before me, and I don't know of anything that would call for some kind of comparison that has talked about this, and therefore the disparity aspect really does not enter the equation here.

3553(a)(5) talks about any pertinent policy statements. And of course that's of historical value, I guess, because at the time that the statute was drafted, with the Sentencing Guidelines being binding, there were certain aspects that were viewed as mandatory, and there were certain other aspects that were viewed as setting policy. And now everything [137] is policy, and therefore 3553(a)(5) really does not play a role. In the same way 3553(a)(4) does not play a role, because 3553(a)(4) simply recites essentially the Guidelines.

Three talks about the kinds of sentences available, and that of course is relevant here, because that talks about the difference between custodial and noncustodial sentences. Those are truly different kinds of sentences. And for the reasons that I will flesh out when I get farther forward in the statutory provision, the availability of a noncustodial sentence seems to me to be appropriate.

Appendix E

I will jump to 3553(a)(1), because that talks about the nature and circumstances of the offense and the history, arrange and characteristics of the defendant. We have had spent hours in discussing that. I am not sure that any further elaboration that I can give would add anything to the nature and circumstances of the offense or the seriousness of the offense, concededly one which he didn't need to commit it in the same sense that maybe a person who is on a drug habit needs to rob a bank. Certainly that was not the case. When I asked him to explain why he did it, his response was, "out of friendship with Levine."

Now again I emphasize he was not being altruistic. Of course he was in it for a gain for himself. But in terms of searching out and reaching out to commit the offense, the nature and circumstances were those that I have heard amply [138] explained. And as to the history and characteristics of the defendant, both sides have been very articulate and vocal in those terms. And in that situation I find that the plus factors outweigh very heavily any factors on the other side.

So now we come to 3553(a)(2). And remember that the standard of 3553(a)(2) is that I have to impose a sentence that is sufficient but not greater than necessary to comply with the purposes of that provision. Again (2)(A) for some reason repeats reflecting the seriousness of the offense, and that's one I spoke to and it was covered in (1) that I have already talked about.

Appendix F

Promoting respect for the law and providing just punishment for the offense again involves, I think, a repetition of the pointed questions that I was positing, primarily to the the government, but I think to both sides. And my determination is that just punishment in this situation is amply met, just as was the case in *Gall* that the Supreme Court upheld. In a situation where the Guidelines called for a substantial custodial period, the Supreme Court said the district court was within its proper purview in determining that no custody was to be required.

As for affording adequate deterrence to criminal. Conduct, frequently I talk about deterrence as coming in two flavors. You know, deterrence in the sense of general deterrence, which means trying to discourage other [139] people not to commit crimes, to try to persuade them not to do that. I have said many times, as I think I may have said this morning, that that's particularly applicable in high profile cases — that you want to make sure that, in cases that get public attention, and you know you just have to look around the courtroom to see that's the case here, that the sentence that's imposed does what Mr. Niewoehner has characterized as "delivering a message." But we don't want to deliver the wrong message. And to me it would be the wrong message under to all of the circumstances here to impose a custodial sentence.

(2)(c) talks about protecting the public from further crimes of the defendant. That's a nonstarter. No risk, as I see it, in that respect. Accordingly I don't have to pause on that.

And the last one, (D) is to provide defendant with needed educational, vocational training, medical care, other correctional treatment in the most effective manner. And that too does play a role here.

Accordingly, pursuant to the Sentencing Reform Act of 1984, it's the judgment of the Court that defendant Edward Vrdolyak is placed on probation for a term of five years.

As I say, nobody has talked extensively, or maybe in any appreciable degree, about conditions of probation. Let me tick off the ones that are mandated. And then I would invite input from both sides about whether anything else is to be

* * *

[147] THE COURT: Yes. In other words, I am not finding whether that's going to get paid or not. All I am saying is that if the answer is "No," the answer certainly would have been "No" in terms of payment to Mr. Vrdolyak. And therefore to think of that as not being satisfied when it's created by the amount of restitution that he would be held for in all events would be — you know the government, I have already said the government is not entitled to double billing here.

MR. MONICO: Your Honor, could we have one week to present the offer of proof?

THE COURT: Yes. Both sides.

MR. MONICO: Thank you.

MR. NIEWOEHNER: Your Honor, the government moves to dismiss the original indictment and the superseding —

THE COURT: Yes. The government's motion for dismissal of all the charges other than what's represented by the single count to which he has pleaded guilty. That motion is granted.

MR. MONICO: Thank you, your Honor.

MR. NIEWOEHNER: Thank you, your Honor.

MR. MONICO: Thank you for your time, your Honor.

(WHICH WERE ALL OF THE PROCEEDINGS HAD AT THE HEARING OF THE ABOVE-ENTITLED CAUSE ON THE DAY AND DATE AFORESAID.)